NO. 58397-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Plaintiff,

v.

TAMMARA TAGGART
Defendant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Spearman

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In this appeal of her conviction for two counts of assault in the third degree, Satina Simpson[1] contends the jury instructions did not adequately convey the law regarding the use of lawful force, requiring reversal of the convictions.

B. ASSIGNMENTS OF ERROR.

1. The trial court violated Ms. Simpson's constitutional right to due process of law, as the "to convict" instructions did not include the absence of self defense as an element which the State must prove beyond a reasonable doubt.

2. The trial court violated Ms. Simpson's constitutional right to due process of law by failing to instruct the jury that she had no duty to retreat.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Where evidence is presented on the issue of self defense/defense of another, due process requires the State prove the absence of the defense beyond a reasonable doubt. The "to convict" instruction given to the jury should contain all of the

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[1] Throughout the trial, the defendant was referred to by the name of Satina Simpson, and for consistency, the same name will be used here. 3/27/06RP 3.

necessary elements of the crime. Where the jury was instructed regarding the use of lawful force, but the "to convict" instructions did not include the absence of lawful force as an element to be proven beyond a reasonable doubt, were the "to convict" instructions flawed requiring reversal of the assault convictions? (Assignment of Error 1).

2. A person does not have a duty to retreat prior to using force to defend herself or another if she is in a place where she has a right to be. Where a jury might erroneously conclude that the defendant should have retreated rather than use force, the trial court must instruct the jury that the defendant had no duty to retreat. Where Ms. Simpson was lawfully situated and the facts show that she could have retreated, did the court err in failing to instruct the jury that she had no duty to retreat? (Assignment of Error 2).

D. STATEMENT OF THE CASE.

In the very early morning hours of July 18, 2004, Seattle Police Officers Samson and Stewart were on patrol. 3/28/06(a.m.)RP 8-9.[2] An investigation into the theft of car keys led them to the

[2] The Verbatim Report of Proceedings consists of seven volumes and will be referred to by the date, followed by 'RP', and the page number.

apartment complex located at 7429 Rainier Ave. South #101. 3/28/06(a.m.)RP 8-9. When they knocked on the door, a baby started to cry. No one answered the door and the baby continued to cry. Concerned about the welfare of the baby, the officers called their supervisor, Sergeant Proudfoot, to the scene. 3/28/06(a.m.)RP 9.

The three officers made contact with an individual they believed to be the apartment manager, and he allowed them entry into apartment #101. They found the baby alone in the apartment with little furniture or food, and Officer Samson made the decision to place the baby with CPS. 3/28/06(a.m.)RP 9-11. The same man who allowed the police into apartment #101 said that the baby's mother could sometimes be found in apartment #104. Officer Samson (who was holding the baby) called the Victim Support Team (VST) to help with transporting the baby, and Officer Stewart and Sgt. Proudfoot proceeded to apartment #104. 3/28/06(a.m.)RP 11-12.

The defendant, Ms. Simpson, answered the door of apartment #104. 3/28/06(p.m.)RP 64-66. Officer Stewart told Ms. Simpson they were looking for the mother of the baby. Ms. Simpson told them the mother was not there. Ms. Simpson offered to take the

baby and moved toward Officer Samson in an attempt to do so. She was told she could not take the baby and to go back to her apartment. 3/28/06(p.m.)RP 68-69.

It is at this point that the testimony diverged. According to the police officers, Ms. Simpson (who was reportedly hostile throughout the encounter) continued to move toward the baby. 3/28/06(p.m.)RP 70. When Sgt. Proudfoot reached out to block her, she loudly told them she was Muslim and for the officers not to touch her. 3/28/06(a.m.)RP 14; 3/28/06(p.m.)RP 70. She yelled for her husband to go and find the mother. 3/28/06(a.m.)RP 15. A crowd was starting to form, and the relationship between the community and police was "not the best." 3/28/06(a.m.)RP 15, 19. Additional officers were called to the scene. 3/28/06(a.m.)RP 19. Officers told Ms. Simpson several times that she was interfering in the investigation and to leave the area, and they threatened her with arrest if she did not do so. 3/28/06(p.m.)RP 70-72.

Crystal Moore, the baby's mother, showed up at the scene. 3/28/06(p.m.)RP 73. Sgt. Proudfoot testified that as he was trying to talk with her, Ms. Simpson would yell at Ms. Moore and get her all riled up. 3/28/06(p.m.)RP 75. Sgt. Proudfoot told Ms. Simpson again that she had to leave the area, and he put his hand on her

arm to "guide her" away. 3/28/06(p.m.)RP 79. Ms. Simpson said "don't touch me" and hit him in the face. 3/28/06(p.m.)RP 79.

At that point Sgt. Proudfoot testified that he attempted to arrest Ms. Simpson for assault. 3/29/06 RP 10.[3] He grabbed her by the left wrist and began to take her down to the ground, but remembered that she was pregnant (he had earlier noticed she appeared pregnant) and so stopped. 3/28/06(p.m.)RP 79-80. He still had a hold of her wrist, however. His testimony was that as she was lying on her back and he was kneeling over her, she raised her leg over her head and kicked him in the neck. 3/28/06(p.m.)RP 80; 3/29/06RP 12. She then intentionally scratched him on the arm with her free hand and he let her go. 3/28/06(p.m.)RP 81.

Additional officers arrived. Several officers testified as she was being arrested, Ms. Simpson kicked Officer Diamond in the groin and scratched Officer Edison in the face. 3/29/06RP 20-22. She also punched Sgt. Proudfoot . 3/29/06RP 22. At that point, Sgt. Proudfoot and Ofc. Edison took Ms. Simpson down to the ground onto her stomach and handcuffed one hand. 3/29/06RP 23-24. Ms. Simpson continued to struggle, and refused to let them put the

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[3] Officer Stewart's testimony was that he heard Sgt. Proudfoot tell Ms. Simpson that she was under arrest for obstruction. 3/28/06(p.m.)RP 5.

handcuffs on the other hand. Officer Anderson hit her in the free arm in order to force her to let go of the handcuffs. 3/28/06(a.m.)RP 48. They were then able to complete the arrest. According to the officers, Ms. Simpson said, "Now you've done it. I'm going to get aid. I'm fucking pregnant." 3/28/06(p.m.)RP 42.

Ms. Simpson's version of the incident was quite a bit different. At the time of the incident, Ms. Simpson was approximately 25 weeks pregnant and her pregnancy was considered high risk due to prior miscarriages. She had been hospitalized the month before (in June of 2004) for abdominal pain and was at high risk of going into preterm labor. All of this was confirmed through the testimony of Dr. Erika Bliss. 3/29/06RP 144, 146-48. Dr. Bliss also testified that a person at Ms. Simpson's stage of pregnancy would be at risk of the placenta shearing off if she suffered a blow to the stomach or a blow that caused a fall. 3/29/06RP 152-54. This could keep the unborn baby from getting sufficient nutrients or lead to preterm delivery. 3/29/06RP 153.

Ms. Simpson testified that as a Muslim woman it is very disturbing to be touched by a man. 3/29/06RP 121. She was dressed in Muslim garb (a long gown and head scarf) when she opened the door for the police at approximately one o'clock in the

morning. 3/30/06RP 14-15, 17. When the police told her that the baby in apartment #101 had been left alone and they were looking for the mother, Ms. Simpson asked her husband to go and look for Ms. Moore. 3/30/06RP 21-23. Ms. Simpson offered to take the baby, but her request was denied. 3/30/06RP 28.

Ms. Simpson went after her husband and was "trotting" around the neighborhood in an attempt to find Ms. Moore. 3/30/06RP 31-35. She started feeling contractions and went back to the apartment building. 3/30/06RP 35-36. She spotted Ms. Moore and tried to assist her in getting back her baby. 3/30/06RP 36-37. Sgt. Proudfoot told her to leave and approached her with his hands out. 3/30/06RP 37, 39-40. Ms. Simpson asked him not to touch her because she was a Muslim woman. 3/30/06RP 40. In spite of her request, Sgt. Proudfoot grabbed her left wrist. 3/30/06RP 42. Ms. Simpson was feeling contractions and went down on her knees. 3/30/06RP 42. She used her free hand to try and push Sgt. Proudfoot's hand off of her, and in the process inadvertently scratched him with the rings she was wearing. 3/30/06RP 43-44, 65-66.

At this point, Ms. Simpson testified that multiple officers jumped in and began beating on her. 3/30/06RP 45. She was on the

ground with her knees up holding her stomach to protect her unborn baby while they punched her and pulled her hair. 3/30/06RP 46-47. She also testified that once on the ground, she stayed there, explaining that due to the pregnancy, she would have needed assistance to get back up. 3/30/06RP 66-67. Ms. Simpson denied interfering with the police investigation, and denied kicking Ofc. Diamond or scratching Ofc. Edison. 3/30/06RP 63, 67. Even after the officers were told that Ms. Simpson was pregnant, one of the officers punched her in the stomach. 3/30/06RP 46. Ms. Simpson testified: "I thought my baby was going to die." 3/30/06RP 49.

Ms. Simpson was taken to Swedish hospital by ambulance before being booked into jail. She testified that she told the doctor at Swedish that she had been hit. 3/30/06RP 76. Contrary to police testimony, Ms. Simpson denied cursing at the officers or threatening them with a lawsuit. 3/30/06RP 74.

Defense witnesses corroborated Ms. Simpson's testimony. Ms. Moore, the mother of the baby, testified that Sgt. Proudfoot initially touched Ms. Simpson for no reason. 3/29/06RP 62. She did not see Ms. Simpson punch or kick the officers. 3/29/06RP 64. She also agreed that the way in which the police were handling Ms.

Simpson could have been a danger to her pregnancy. 3/29/06RP 65. Valeria Baber, a neighbor, testified that the police handled Ms. Simpson "too rough." 3/29/06RP 91. She did not see Ms. Simpson hit or kick any of the officers, but did see Officer Anderson hit Ms. Simpson in the stomach. 3/29/06RP 87, 89-90.

Additional witnesses questioned the officers' testimony. Dr. Bliss testified that a woman in Ms. Simpson's stage of pregnancy would have a difficult time lying on her back and kicking over her head (as Sgt. Proudfoot claimed). 3/29/06RP 157-58. Finally, Benjamin Shabazz, a minister at the Islam center in Seattle, testified that Ms. Simpson did not have a reputation in the community for violence or aggression. 3/29/06RP 171-72.

Ms. Simpson was charged with three counts of assault in the third degree under RCW 9A.36.031(1)(g)(Count I charged her with assaulting Sgt. Proudfoot, Count II concerned Ofc. Edison, and Count III concerned Ofc. Diamond). CP 6-7. The jury was given WPIC 17.02.01 (concerning lawful force as it pertains to alleged assaults on law enforcement officers). CP 31. The jury was not given WPIC 16.08 (no duty to retreat) although it was offered by defense counsel. The jury convicted Ms. Simpson of counts I and III but was unable to reach a verdict on Count II, and that charge

was ultimately dismissed. CP 34-36. Ms. Simpson filed a timely appeal as to the two convictions for assault in the third degree. CP 49.

E. ARGUMENT.

1. THE "TO CONVICT" INSTRUCTIONS GIVEN TO THE JURY WERE DEFECTIVE BECAUSE THEY DID NOT INCLUDE THE ABSENCE OF SELF DEFENSE AS AN ELEMENT WHICH THE STATE MUST PROVE BEYOND A REASONABLE DOUBT.

a. Once the issue of self defense is raised, the State bears the burden of proving the absence of self defense beyond a reasonable doubt. The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every element of the crime charged. State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (citing In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)). Assault is defined as an intentional act committed with unlawful force. See WPIC 35.50. Since self defense is lawful, it negates the intent requirement in an assault charge. For this reason, once the issue of self defense is raised, the jury must be informed that the State bears the burden of proving the absence of self defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

In addition, the Legislature intended for the State to disprove self defense. RCW 9A.16.020 is silent as to who has the burden of proof where self defense is an issue. However, the court in Acosta pointed out that the Legislature has specified that many other defenses are affirmative defenses. The court wrote:

> The Legislature's silence on the burden of proof of self-defense, in contrast to its specificity on these other defenses, is a strong indication that the Legislature did not intend to require a defendant to prove self-defense.

Acosta, 101 Wn.2d at 615-16.

b. The "to convict" instruction must include all elements essential for conviction. The "to convict" instruction must include all elements of the crime. State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). The court in Emmanuel explained:

> [t]he trial court undertook to specifically tell the jury in instruction No. 5 [the to-convict instruction] that they could convict appellant if they found that four certain elements of the crime had been proven beyond a reasonable doubt. In effect, the judge furnished a yardstick by which the jury were to measure the evidence in determining appellant's guilt or innocence of the crime charged. The jury had a right to regard instruction No. 5 as being a complete statement of the elements of the crime charged. This instruction purported to contain all essential elements, and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in instruction No. 5.

Emmanuel, 42 Wn.2d at 819.

Although Emmanuel is an older case, it continues to be followed. In State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005), the court stated: "We generally adhere to the principle that the "to convict" instruction must contain all elements essential to the conviction." Mills, 154 Wn.2d at 7.

c. The failure of the trial court to include the absence of self defense in the "to convict" instructions requires reversal of Ms. Simpson's convictions. The jury received three "to convict" instructions, one for each count charged. CP 27, 29, 30. The instructions stated:

> To convict the defendant of the crime of Assault in the Third Degree, as charged in Count ___[4], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 18, 2004, the defendant assaulted _____;
>
> (2) That at the time of the assault _____ was a law enforcement officer who was performing his official duties; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty, as to Count ___.

[4] The three "to convict" forms are identical with the exception of the Count number and the name of the alleged victim.

> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty, as to Count ___.

Nowhere in the "to convict" instructions is the absence of lawful force listed as an element of the assault charge.

The court in Mills stated that the omission of an element from the "to convict" instruction is a manifest constitutional error that may be raised for the first time on appeal. Mills, 154 Wn.2d at 6. The adequacy of a challenged "to convict" jury instruction is to be reviewed de novo on appeal. Mills, 154 Wn.2d at 7.

Even where the jury could obtain the missing element by looking at the other instructions, the court in Emmanuel held that the error was not harmless. Emmanuel, 42 Wn.2d at 819. Rather, the court found that such error was "necessarily misleading and prejudicial to the accused. It is equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition by the court." Emmanuel, 42 Wn.2d at 821(quoting Croft v. State, 117 Fla. 832, 158 So. 454 (1935)); see also Mills, 154 2d. at 7 (stating "the reviewing court generally may not rely on other instructions to supply the element missing

from the 'to convict' instruction) (quoting State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000(2003)).

Similarly, in State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997), the State argued that the instructions as a whole were adequate, but the court disagreed:

> We can only assume that the jury relied upon the "to convict" instruction as a correct statement of the law. The jury was not required to search the other instructions to make sense of the erroneous "to convict" instruction, and we cannot assume that the jury attempted to compensate for the court's error by doing so. We, therefore, cannot say that the error was harmless.

Smith, 131 Wn.2d at 265.

The jury in the present case was instructed regarding the use of lawful force in WPIC 17.02.01.[5] However, lawful force was not mentioned in the "to convict" instructions. The "to convict" forms instructed the jury that it was their duty to return a verdict of guilty if it was proven that the defendant assaulted the officers, that the

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[5] The trial court's instruction No. 15 to the jury read:

"It is a defense to a charge of assault third degree that force used was lawful as defined in this instruction.

A person may use force to resist an arrest only if the person being arrested is in actual and imminent danger of serious injury. The person using force may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

officers were performing their official duties at the time of the assault, and that the acts occurred in Washington. The trial court furnished the jury with a "yardstick" by which they were to measure the evidence in determining Ms. Simpson's guilt or innocence. Emmanuel, 42 Wn.2d at 819. The "to convict" instructions purported to contain all the essential elements of assault in the third degree. The jury had a right to regard the "to convict" instructions as being complete statements of the elements of assault in the third degree. Emmanuel, 42 Wn.2d at 819. The error is not harmless and requires reversal of the convictions. Emmanuel, 42 Wn.2d at 819; Mills, 154 Wn.2d at 7; Smith, 131 Wn.2d at 265.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT MS. SIMPSON HAD NO DUTY TO RETREAT.

a. A "no duty to retreat" instruction is required where the defendant is in a place where he or she has a right to be. In the majority of states, the law imposes no duty to retreat on one who acts in self defense and who was not the original aggressor. See W. Lafave and A.Scott, Jr., Criminal Law § 5.7(f) at 460-61 (2d ed.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." CP 31.

1986). Washington State has long followed this rule. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). A defendant is entitled to a "no duty to retreat" instruction when the evidence supports a finding that he or she is assaulted in a place where he or she has a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.2d 1001 (2003); State v. Williams, 81 Wn.App. 738, 742, 916 P.2d 445 (1996); State v. Wooten, 87 Wn.App. 821, 825, 945 P.2d 1144 (1997) rev. denied, 134 Wn.2d 1021 (1998).

b. The trial court should have instructed the jury that Ms. Simpson had no duty to retreat. The trial court properly gave the jury WPIC 17.02.01, which defines lawful force as it pertains to alleged assaults on law enforcement officers. CP 31. In her closing argument, Ms. Simpson's attorney denied that much of what the police claimed actually took place, and she argued that the actions Ms. Simpson did take were either unintentional or justified by the lawful use of force. Defenses of accident and self defense are not mutually exclusive. State v. Callahan, 87 Wn.App. 925, 932, 943 P.2d 976 (1997). Judge Spearman properly instructed the jury regarding the lawful use of force.

Ms. Simpson lived in apartment #104 of the apartment complex in question. 3/30/06RP 14. As an apartment resident, she was

entitled to be on the premises of the apartment complex where the incident took place. At the point where Sgt. Proudfoot grabbed her by the arm she was lawfully entitled to remain where she was and defend herself and her unborn baby. Ms. Simpson's trial attorney offered the following standard "no duty to retreat" jury instruction:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that she is being attacked to stand her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat. (WPIC 16.08).

Suppl. CP ____ (Sub. No. ____).

Counsel also offered a jury instruction concerning free speech:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (U.S. CONST. amend. I).

Suppl. CP ____ (Sub. No. ____).

The State argued that the defense was not entitled to the "no duty to retreat" instruction because Ms. Simpson had been told by the police to leave the area, and therefore she was not in a place where she had a right to be. 3/30/06RP 2-3. The trial court declined to give both the "no duty to retreat" instruction and the First Amendment instruction, as well as the "first aggressor"

instruction offered (and later withdrawn) by the State. 3/30/06RP 125. The trial court reasoned that none of these three instructions pertained to the "real issue" of whether there was an actual or imminent threat to cause injury. 3/30/06RP 125. Ms. Simpson's attorney took exception to the court's failure to instruct the jury concerning the "no duty to retreat". 3/30/07RP 124-25.

Ms. Simpson was entitled to exercise her free speech rights. In Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), a man was charged with violating a Houston ordinance that made it unlawful to interrupt a police officer in the performance of his or her duties (he shouted at police in an attempt to divert their attention from his friend during a confrontation). The Supreme Court found the ordinance to be unconstitutionally overbroad under the First Amendment. Similarly, in the case at hand, Ms. Simpson had a right to address her husband, Ms. Moore, and the police, even if her speech caused "public inconvenience, annoyance, or unrest". Houston v. Hill, 482 U.S. at 461.

Moreover, Ms. Simpson's presence was necessary in order for her to exercise her First Amendment right to speak. See Schenck v. Pro-Choice Network, 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (striking down an injunction prohibiting abortion

protesters from being within fifteen feet of any person or vehicle entering or leaving an abortion clinic because such injunction restricted the protesters' rights to free speech). The police were free to take their investigation elsewhere. Ms. Simpson had a First Amendment right to be present and to speak and she was therefore entitled to a "no duty to retreat" instruction.

c. Because the jury could have concluded that flight was a reasonable alternative to the use of force, the failure of the trial court to give the "no duty to retreat" instruction requires reversal of Ms. Simpson's convictions. The court in Redmond wrote:

> The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case. Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it.

Redmond, 150 Wn.2d at 495. Where the jury could have concluded that flight was a reasonable alternative to the defendant's use of force, failure to give a "no duty to retreat" instruction is reversible error. Redmond, 150 Wn.2d at 495; Wooten, 87 Wn.App. at 826; Williams, 81 Wn.App. at 744.

The State contended in this case that Ms. Simpson did have a duty to retreat because the officers ordered her to do so. Sgt.

Proudfoot testified that he told Ms. Simpson numerous times she was interfering in the investigation, and that if she did not leave the area, she would be arrested. 3/28/06(p.m.)RP 70-72. In cross-examining Ms. Simpson, the prosecutor asked her:

> Isn't it true that you interjected yourself over and over and over in this investigation of an abandoned baby?
>
> And the officers were either near the vicinity or talking to this mother of the child and you kept interfering with that investigation?

3/30/06RP 63. In his closing argument to the jury, the prosecutor made similar arguments:

> The defendant over and over and over and over interfered with the police officers' ability to do their job. 4/3/06RP 6.
>
> [Ms. Simpson] created a situation for these officers that was dangerous for them. 4/3/06RP 12-13.

A reasonable juror could have concluded Ms. Simpson should have left the area rather than use force to defend herself and her unborn baby. Thus, the trial court was required to instruct the jury that she had no duty to retreat, and failure to give the instruction was prejudicial error. Reversal is required.

F. CONCLUSION.

Because the jury instructions did not adequately convey the law regarding the use of lawful force, Ms. Simpson's convictions for assault must be reversed.

DATED this 25th day of April, 2007.

Respectfully submitted,

_____
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